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91

No. ....., Original

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF WEST VIRGINIA,
Defendant.

Action in Original Jurisdiction

Motion for Leave to File a Complaint With Attached Complaint

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No. ....., Original

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF WEST VIRGINIA,
Defendant.

Motion for Leave to File a Complaint

The State of California, by George Deukmejian, its Attorney General, respectfully requests leave of this Court to file its complaint against the State of West Virginia, submitted herewith. The State of California seeks to bring this suit under the authority of Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a)(1).

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No. ....., Original

United States Supreme Court

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Plaintiff,

v.

STATE OF WEST VIRGINIA,
Defendant.

Complaint for Damages

COMPLAINT

The State of California, by George Deukmejian, its Attorney General, brings this suit for damages on behalf of its subdivision, California State University and Colleges, San Jose State University against the State of West Virginia and its subdivision, the Regents of the University of West Virginia, and for its cause of action alleges as follows:

ACTION AND JURISDICTION

I.

1. This is an action for damages for breach of contract by the State of California against the State of West Virginia.

II.

2. This Court has original and exclusive jurisdiction of this controversy pursuant to Article III, Section 2, Clause 2 of the United States Constitution, and pursuant to 28 U.S.C. § 1251(a)(1).

PARTIES

3. The State of California is a sovereign state of the United States of America. The California State University and Colleges system is a creature of the California legislature, dedicated to the higher education of its citizens. It is governed by a Board of Trustees. San Jose State University constitutes one of the numerous campuses which carry out the functions of the agency.

4. The State of the West Virginia is a sovereign state of the United States of America. West Virginia University is a creature of the West Virginia legislature, dedicated to the higher education of its citizens. It is governed by a Board of Regents.

NATURE OF THE CONTROVERSY

5. On or about February 21, 1974, a contract was executed by the appropriate authorities of San Jose State University and West Virginia University.

6. Among the terms of the contract was an agreement that the two schools engage in two intersectional, intercollegiate football games, the first of which was to be played

at San Jose, California, on October 31, 1981; and the second of which was to be played at Morgantown, West Virginia, on October 30, 1982.

7. In late December, 1980, an authorized agent and official of West Virginia University communicated to a San Jose State University agent and official that, notwithstanding the existence of the written contract, West Virginia University would not engage in the scheduled football contests.

8. San Jose State University authorities thereafter attempted to persuade West Virginia to reconsider its decision by promising to make the contract more attractive to the latter by such considerations as increasing the minimum guarantee at the San Jose game site; absorbing the housing costs for West Virginia's team personnel for the California game; and, further, offering to accept a lower percentage of gate receipts at the West Virginia game site.

9. Notwithstanding these further inducements, West Virginia declined to change its position.

10. Prior to receiving the decision from West Virginia in December 1980 that it would not play the football games San Jose State University had printed and mailed promotional materials for season ticket sales, including brochures and other announcements, and which indicated to the prospective buyers that West Virginia University would be one of five home game opponents, and was scheduled for October 31, 1981.

11. As a result of the late cancellation of the contest by defendant West Virginia, San Jose State University has incurred considerable costs. By way of specification, but not by way of limitation, costs have been incurred by having

to attempt to obtain substitute opponents, rearrange playing dates and of having to cancel a previously scheduled intercollegiate basketball game because it now conflicts with a substitute football game which has been obtained for a different date.

12. In addition San Jose State University will have to absorb increased costs in order to play the substitute game it has obtained for November 28, 1981.

13. Other additional costs and loss of revenue will occur, but which cannot be presently ascertained, by such things as loss of good will, lack of an opponent at this time for the vacant 1982 date, and loss of the share of gate receipts anticipated for the cancelled Morgantown game site.

14. At all times mentioned herein, San Jose State University has been willing to perform its obligations under the aforementioned contract.

15. San Jose State University is informed and believes that West Virginia University has scheduled football contests with other opponents for the dates October 31, 1981 and October 30, 1982.

16. San Jose State University through the California Attorney General's Office, has made a demand for just compensation on the Attorney General's Office of West Virginia, legal counsel for West Virginia University and which represents the University in this dispute.

17. As of the date of this writing, no reply has been received in response to the demand for compensation for breach of the contract.

18. For all of the above reasons, there exists a justiciable case and controversy between the State of California and the State of West Virginia.

PRAYER

WHEREFORE, the State of California prays for relief as follows:

(1) For an order granting the State of California leave to file its Complaint for Damages herein;

(2) For an award of general damages in the amount of One-hundred twenty-five thousand dollars ($125,000.00);

(3) For an award of punitive damages in the amount of One-hundred thousand dollars ($100,000.00);

(4) For plaintiff's costs of suit incurred herein; and,

(5) For such other relief as may be proper.

DATED: July 17, 1981

Respectfully submitted,

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Attorney General of the
State of California

RICHARD MARTLAND
Assistant Attorney General

GORDON ZANE
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No. ....., Original

Supreme Court of The United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF WEST VIRGINIA,
Defendant.

Brief in Support of (1) Motion for Leave to File Complaint (2) Complaint for Damages

---

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State of California

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I.

QUESTIONS PRESENTED

(1) Should the Court grant California leave to file its complaint under the Court's original jurisdiction?

II.

PARTIES

The plaintiff is the State of California, and the defendant is the State of West Virginia.

III.

JURISDICTION

This Court has original and exclusive jurisdiction of the case under Article III, Section 2, Clause 2 of the United States Constitution, and under 28 U.S.C. § 1251(a)(1).

IV.

STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

The State of California brings this action on behalf of one of its State agencies, the Board of Trustees of the California State University and Colleges, and one of its campuses, San Jose State University, to seek redress for breach of contract against the State of West Virginia and one of its State agencies, the Regents of West Virginia University.

This action finds its genesis in a contract negotiated between authorized agents of San Jose State University and West Virginia University on February 21, 1974, wherein the two schools agreed to play two intercollegiate football

games, at the respective home fields of each, on October 31, 1981 and October 30, 1982. The contract contained various other clauses, covering such particulars as split of gate proceeds, etc.

Just prior to Christmas of 1980 the Athletic Director of San Jose State University received a telephone communication from the Athletic Director of West Virginia University. The purpose of the call was to inform San Jose State University that West Virginia University would not be playing at San Jose in the fall of 1981, and that the contract would not be honored. The San Jose State representative protested strenuously, pointing out that it was too late to sever the contract, but to no avail.

Thereafter, in January 1981, at a convention in Miami, Florida, the San Jose State Athletic Director met with his counterpart from West Virginia University, and offered to increase the minimum guarantee for playing at San Jose by another $10,000; and also to provide housing for the West Virginia personnel at no cost when the team came to play in California. Also, an offer was made to accept a lower percentage of the gate for the game to be played at Morgantown. Again the response of West Virginia was that it was not interested, and that it had already replaced the two scheduled San Jose State games on its schedule with other schools.

Thereafter additional efforts were made by other parties, including staff counsel of the State University System in California to persuade West Virginia to honor its contract, but without success.

Prior to receiving the announcement from West Virginia that the football games would not be played San Jose State had printed and distributed announcements and brochures of its 1981 football schedule as part of its Christmas season

ticket sales promotion, and had of course, included West Virginia University as one of its home game opponents.

The California University authorities then asked for the assistance of the California Attorney General, who is, by law, required to represent the agency in all of its litigation. (California Government Code section 12511, *et seq.*.) Various communications were initiated by the California Attorney General's office to the office of the Attorney General of West Virginia to explore the possibility of resolving the problem without recourse to the courts. It was not possible to arrive at a solution, and recourse to litigation appears to be the only method by which San Jose State University can obtain adequate damages to compensate it for the breach of contract.

V.

THE NEED FOR INVOKING THE ORIGINAL JURISDICTION OF THIS COURT

This case involves a critical question, and needs resolution to remove a threat to the area of harmonious relationships between the States. Shall the States honor their contracts with one another, or be free to breach them if they subsequently determine that, from the interests of a particular State, it has not made a "good" contract, so unilateral breach is the solution? It is submitted that the delicacy of this problem, and problems just like it, are the reasons Article III, Section 2, Clause 2 of the United States Constitution was incorporated into the original Constitution.

It is further contended that both University systems involved herein are agencies of their respective states, and the substance of San Jose State University's claim is indeed a State of California claim, made against the substantive interest of the State of West Virginia.

The California State University and Colleges system, of which San Jose State University is a part is an agency of the State of California in the educational field; in other words, a branch or department of the State of California. In the case of *Arkansas v. Texas* (1953) 346 U.S. 368, [98 L.Ed.2d 80], the issue of whether a state university was the equivalent of a state was considered, and affirmed. In arriving at its determination, the Court noted several factors, at page 370:

> "The University, which was created by the Arkansas legislature, is governed by a Board of Trustees appointed by the Governor with the consent of the Senate. The Board, to be sure, is a 'body politic and corporate' with power to issue bonds which do not pledge the credit of the State. But the Board must report all of its expenditures to the legislature, and the State owns all property used by the University. The Board of Trustees is denominated a 'public agency' of the State, the University is referred to as 'an instrument of the state' in the performance of a governmental work, and a suit against the University is a suit against the State." 346 U.S. at 370.

Examining first West Virginia University, it is noted that it is governed by a Board of Trustees who are appointed by the Governor with the advice and consent of the Senate. Title 18, West Virginia, Chapter 11, section 1 (§ 18-11-1). It must report on its operations annually to both the Governor and the Legislature. (§ 18-11-1.) The Board holds title to all property of the University in Trust for the State and not as an independent corporate entity. *City of Morgantown v. Ducker* (1969) 153 W.Va. 121; [168 S.E.2d 298, 301]. It is a public and governmental body and as such is an arm of the state. *State ex. rel. Board of Governors v. Sims* (1960) 134 W.Va. 428, [59 S.E.2d 705].

Again, in the case of *City of Morgantown, Id.*, 302, 304; it was held by the Supreme Court of Appeals of West Virginia that West Virginia University is "an arm of the state", and performs a governmental function of the state.

Similarly, the California State University and Colleges, and San Jose State University are creatures of the legislature. *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942; [107 Cal.Rptr. 596]. California Education Code (Reorganized), Section 66600, *et seq.*. The Board of Trustees is composed of four ex officio members—the Governor, Lieutenant Governor and Superintendent of Public Instruction, and Chancellor, and in addition 16 members who are appointed by the Governor subject to confirmation by the Senate. The property administered by the Board belongs to the State, and any lease of property by the Trustees requires approval of the State Director of Finance. California Education Code section 89046.[1]

It has also been held that employees of the State University and Colleges system are state employees, subject to the civil service rules; and that the system, unlike the University of California, is subject to full legislative control and has only such autonomy as the legislature chooses to bestow. *Slivkoff v. Board of Trustees* (1977) 68 Cal.App.3d 394; [137 Cal.Rptr. 920].

Thus, as appears from the foregoing, both educational systems are instrumentalities of the state, and the real parties in interest in this case are the States of California and West Virginia. (As can be seen also by the cases cited

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1. Specific provisions of the Education Code create exceptions to the restrictions on the Trustees' powers to sell or lease property, but all require that any funds so obtained shall be reinvested in other specific kinds of real property. California Education Code sections 90406, 90420 and 90440.

above, the Attorney General of each State gives legal representation to the educational institutions on behalf of the respective states.)

This would not be the first contractual dispute between states to be granted an original hearing by this Honorable Court. See *Kentucky v. Indiana* (1930) 281 U.S. 163 [74 L.Ed. 785].

While it is true that this Court has declined to exercise its original jurisdiction in actions between states if it appears that the plaintiff is attempting to protect purely private interests rather than its own sovereign interests, *Pennsylvania v. New Jersey* (1976) 426 U.S. 660 [49 L.Ed.2d 124]; *Alabama v. Arizona* (1934) 291 U.S. 286 [78 L.Ed. 798]; such is not the case here. In the instant case, there are no private parties involved; and, hence the line of cases asserting the principle of *Pennsylvania v. New Jersey* (1976) 426 U.S. 660, would be inapplicable. Moreover, there is no basis for asserting jurisdiction in the federal district courts, and resort to a state court would be inappropriate since the controversy involves two states. In short, without access to this Honorable Court plaintiff would lack a tribunal to seek redress for the wrong it has suffered, and a state will have achieved a breach of contract against another state with total legal immunity. Unlike the situation, for example, in *Washington v. General Motors* (1971) 406 U.S. 109, 114 [31 L.Ed.2d 1043]; where the Court concluded that there was available to the parties the federal district court as an alternative forum, in this case there are none.

Also, the unavailability of a state forum was epitomized in the case of *Kentucky v. Indiana, Id.* at 165, where this court observed:

> "... It would be an anomaly if the contract entered into by the proper officers pursuant to legislative authority could be declared invalid by the courts of either

state. If such were the rule, the courts of one state might hold the contract to be valid and the courts of the other state might hold it to be invalid. Cf. *Arkansas v. Tennessee* 246 U.S. 158" 281 U.S. at 165.

CONCLUSION

The state educational institutions involved in this contract dispute are instrumentalities of their respective states, and an injury to San Jose State University pursuant to the contract is an injury to the State of California. Without recourse to this Court it is conceivable that educational institutions in the respective states could breach interstate contracts with impunity, contrary to our system of federalism. As this court held in the early days of our republic, a court possessed of jurisdiction generally must exercise it. *Cohens v. Virginia* (1821) 6 Wheat 264, 404.

It is respectfully requested that this Court grant California's motion for leave to file its original complaint herein.

DATED: July 17, 1981

Respectfully submitted,

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STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF WEST VIRGINIA,

Defendant.

ACTION IN ORIGINAL JURISDICTION

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

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I.

QUESTION PRESENTED

Does a claim for loss of opportunity for revenue associated with a dispute as to the terms of an executory contract entered into by the athletic departments of two state supported universities in separate states present a threat to the interests of the plaintiff state in its capacity of quasi sovereign so that invoking the original jurisdiction of this Court is appropriate?

II.

PARTIES

The plaintiff is the State of California, and the defendant is the State of West Virginia.

III.

STATEMENT OF THE CASE

The statement of the case made by the State of California is acquiesced to generally for its recitation of the facts as presented. However, exception is taken to the omission of one crucial fact.

California has failed to inform the Court that the alleged contract contained an escape clause:

> "8. It is recognized that neither party can foresee the exigencies which may hereafter arise by reason of emergency, catastrophe or epidemic making it necessary or desirable, in the judgment of West Virginia University or San Jose State University, to cancel this agreement. Any financial obligations for the promotion of this contest made by either party prior to the date of cancellation of this contract shall be shared equally by the parties of this agreement." (Emphasis supplied.)

West Virginia merely exercised its rights under the contract. There has been no resort to unilateral rescission of the agreement.

IV.

SUMMARY OF ARGUMENT

1. Before a plaintiff state may invoke the original jurisdiction of this Court, the plaintiff state must show there exists a serious and imminent threat of injury to the interest of the state in its capacity of quasi sovereign and the redress of which requires the action of the United States Supreme Court as a matter of absolute necessity.

2. The activity in which California was engaging--the carrying on of a major intercollegiate football program with the scheduling of games on opposite sides of the continent--is not an interest of the plaintiff state which is of

necessary significance to invoke the original jurisdiction of the United States Supreme Court.

3. The interest sought to be protected by California is not substantial, and as California seeks to recover for the loss of opportunity for revenue it is highly speculative. This Court need not act as a matter of absolute necessity to protect California.

4. The invoking of the original jurisdiction of this Court is not mandated. The interest of California sought to be protected is not that of the quasi sovereign, is of relative insignificance, and is speculative in nature. Contrary to the assertions of California, this Court has not previously heard a dispute of this nature.

5. A satisfactory alternative forum exists where the plaintiff state

may seek redress of its grievance. In light of the existence of this alternative forum, this Court need not act as a matter of absolute necessity.

V.

ARGUMENT

The State of California is attempting to make this Honorable Court the arbitrator of an agreement to play an intercollegiate football game. California claims an interest of the sovereign is endangered. But the arguments, points and authorities relied on by California do not disguise the fact that the transaction at issue deals with nothing more substantial than the alleged loss of revenue associated with the cancellation of an intercollegiate sporting event. Does the United States Constitution, Article III, Section 2, Clause 2, and 28 U.S.C. § 1251(a)(1)

which implements it, require this Court to take jurisdiction of controversies of this nature?

California, as the plaintiff state, bears the burden of alleging facts in its complaint which are clearly sufficient to support a decree in its favor. Alabama v. Arizona, 291 U.S. 286, 78 L. Ed. 798, 54 S. Ct. 399 (1934). This burden goes beyond the mere prima facie representation that a cause of action recognized at law is applicable to the dispute. The plaintiff state must establish that the injury complained of is to its sovereign interest.

This prudent limitation over the extension of original jurisdiction arises from the recognition of the special nature of conflicts that may develop between states in a federal system. The nature of the disputes

between states contemplated for resolution by the Supreme Court is limited to those which would arise from an injury to a state in its capacity of quasi sovereign, and if occurring between states entirely independent would properly be the subject of diplomatic adjustment. North Dakota v. Minnesota, 263 U.S. 365, 68 L. Ed. 342, 44 S. Ct. 138 (1923). Thus, states are not free to resort to the Supreme Court for every controversy for which a private individual might be free to seek judicial intervention. Alabama v. Arizona, supra; Colorado v. Kansas, 320 U.S. 383, 88 L. Ed. 116, 64 S. Ct. 176 (1943). In respect of the wisdom of the foregoing limitation, each individual case must be examined to determine if, in fact, it presents a serious and imminent threat of injury to the interest

of one state in its capacity of quasi sovereign which has been caused by the action of another state, and the redress of which requires the action of the Supreme Court as a matter of absolute necessity.

Original jurisdiction of the Supreme Court extends to controversies between states of the Union. Monaco v. Mississippi, 292 U.S. 313, 78 L. Ed. 1282, 54 S. Ct. 745 (1934). Before a state may sustain an action against another, the plaintiff state must first demonstrate that the injury for which redress is sought was directly caused by the actions of another state. Pennsylvania v. New Jersey, 426 U.S. 660, 49 L. Ed. 2d 124, 96 S. Ct. 2333 (1976); Massachusetts v. Missouri, 308 U.S. 1, 84 L. Ed. 3, 60 S. Ct. 39 (1939). The power exerted by the Supreme Court in

such disputes is extraordinary and will not be exercised unless the threatened injury is clearly shown to be of serious magnitude and imminent. Alabama v. Arizona, supra; Connecticut v. Massachusetts, 282 U.S. 660, 75 L. Ed. 602, 51 S. Ct. 286 (1931); Washington v. Oregon, 297 U.S. 517, 80 L. Ed. 837, 56 S. Ct. 540 (1936); Colorado v. Kansas, supra, reh. denied, 321 U.S. 803, 88 L. Ed. 1089, 64 S. Ct. 633 (1944). And, in respect of controversies between states, the jurisdiction of the Court will not be exerted in the absence of absolute necessity. Alabama v. Arizona.

The first dispute between states decided under the United States Supreme Court's original jurisdiction was New York v. Connecticut, 4 Dall. 3, 1 L. Ed 715 (1799), a dispute over title to land claimed by both states. In a series of

cases from New Jersey v. New York, 5 Pet. 285, 8 L. Ed. 127 (1831), to Nebraska v. Iowa, 406 U.S. 117, 31 L. Ed. 2d 733, 92 S. Ct. 1379 (1972), original jurisdiction has been invoked for the determination of boundary disputes between states. Concerning as they do, the territorial sovereignty of states, cases of this nature represent the majority of decisions in original jurisdiction.

Resorting to this Court for equitable or injunctive relief has been held a proper instance for the taking of jurisdiction. Jurisdiction has been found proper in situations in which there has been interference with, or division of, waters flowing from one state into another, Connecticut v. Massachusetts, supra; Nebraska v. Wyoming, 325 U.S. 589, 89 L. Ed. 1815,

65 S. Ct. 1332 (1945); abatement of interstate pollution Vermont v. New York, 406 U.S. 186, 31 L. Ed. 2d 785, 92 S. Ct. 1603 (1972); and, sewage disposal by one state affecting the health of the citizens of another state. Missouri v. Illinois, 180 U.S. 208, 45 L. Ed. 497, 21 S. Ct. 331 (1901); New York v. New Jersey, 256 U.S. 296, 65 L. Ed. 937, 41 S. Ct. 492 (1921). In this line of cases the interest of the sovereign in protecting the safety and health of its citizens is readily apparent.

The two areas of controversy just discussed exemplify the special nature of the sovereign interest of states which the original jurisdiction of the Supreme Court was established to protect. Although this Court has heard disputes in other areas, the common thread throughout has been that an

interest of the plaintiff state recognized by this Court as sovereign was exposed to injury unless this Court exercised its power. Pennsylvania v. West Virginia, 262 U.S. 553, 67 L. Ed. 1117, 43 S. Ct. 658 (1923); Texas v. Florida, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 513 (1939). That common thread is lacking in the California complaint. The invocation of original jurisdiction would not be appropriate for the interest in controversy in the instant case.

Representations have been made that the respective governing bodies charged with administering the institutions of higher learning whose athletic departments entered into the disputed contract are instrumentalities of their respective states. This is a conclusion with which this Court would appear to concur. Arkansas v. Texas, 346 U.S. 368, 98 L.

Ed. 2d 80, 74 S. Ct. 109 (1953). California is attempting to extend this proposition to allege that any activity attributable to these governing bodies, such as the activity of an intercollegiate athletic department is, per se, of such consequence and importance that whenever a dispute arises between the athletic departments of state supported universities, the dispute must be resolved in the United States Supreme Court. This proposition is neither conclusive nor persuasive that the instant controversy between the athletic departments of West Virginia University and San Jose State University must be resolved in this Court.

Unlike the cases discussed in the foregoing recital of the history of this Court's invoking of its original jurisdiction, the instant case is in comparison

a triviality. Giving rise to the dispute is a contract to play two football games on opposite sides of the continent. The contract has a cancellation clause which one of the parties invoked and to which act the other objects.

Since the cancellation of the contract, San Jose State University has obtained a substitute opponent for one of the terminated games. Otherwise, San Jose State University made demand on West Virginia University for the sum of One Hundred Thousand ($100,000.00) Dollars. But of this amount, less than Five Thousand ($5,000.00) Dollars has been designated by California to be actual out-of-pocket expense.

Other than this insignificant sum, for which West Virgnia has tendered compensation,[1/] the claim of California

1. West Virginia University made a public offer to San Jose State University to pay the sum of Twenty-eight Thousand Fifty ($28,050.00) Dollars in settlement of this dispute.

is for loss of potential revenue. And as it pertains to perceived loss of opportunity for revenue, the claim has its foundation in estimate and speculation.

The injury alleged by California, based primarily on speculation and estimate and to only a minimum extent on actual cost, is neither in amount prayed for nor in its alleged impact serious in magnitude or imminent in occurrence. Alabama v. Arizona, supra; Connecticut v. Massachusetts, supra; Washington v. Oregon, supra; Colorado v. Kansas, supra. Unlike disputes of the nature contemplated in North Dakota v. Minnesota, supra, the instant case would be a doubtful candidate for settlement by diplomatic adjustment. The rule set forth in that case was in recognition of the fact that this nation is a federation of states which, even in forming

the Union, retained a great deal of independent authority. In exercising this authority states may come into conflict. But with the growth and development of this nation, the several states have embarked on activities not contemplated at the formation of the Union. The carrying on of an intercollegiate athletic program is such an activity.

The contracting for football games is not an activity which is within the sole province of the states' authority. Neither is it an activity which must be engaged in by two states. Both West Virginia University and San Jose State University contract for the playing of football games with privately chartered institutions of higher learning. It is only by an accident of the marketplace in the making of the contract that the

parties are construed as states, thus allowing the plaintiff to seek to invoke the jurisdiction of this Court.

If the present dispute arose between San Jose State University and Stanford University, a private institution of higher learning now on San Jose's schedule, there is no question that resort to this Court would be inappropriate. The instant dispute, although involving two state supported universities, is of no greater magnitude than the preceding example. Neither San Jose State University nor West Virginia University in entering into the contract was exercising the independent authority of their respective states in a manner contemplated by North Dakota v. Minnesota, supra.

California, in asking the Court to take jurisdiction in this dispute is, by

implication, asking the Court to throw open its doors and become a tribunal for the resolution of every dispute, no matter how trivial or insignificant, that may in some remote manner arise between states of the Union. With the ever increasing expansion of states into more and more activities, both within and without territorial boundaries, the number of conflicts which could come before this Court may be great.

The history of the extension of the original jurisdiction of this Court consists of a case by case evaluation of the necessity and propriety of the exercise of that jurisdiction. Indeed, this Court in other circumstances has not hesitated to distinguish the activities of both states of the Union, Employees v. Missouri Public Health Dept., 411 U.S. 279, 316 L. Ed. 2d 251,

93 S. Ct. 1614 (1973); National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), (distinguishing activities of a state which are or are not subject to federal control under the Commerce Clause, United States Constitution, Article I, § 3, cl. 2), and foreign states. Alfred Dunhill of London, Inc. v. Cuba, 425 U. S. 682, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976), (distinguishing circumstances for proper application of "act of state" doctrine). Continuing in that tradition by refusing to invoke original jurisdiction in the instant case would be appropriate and would not prejudice the rights of California.

San Jose State University would not be denied a tribunal if this Court declined jurisdiction, but would merely be placed in the circumstances of a

private institution of higher learning that has entered into a similar agreement.[2/] Although California argues that an appropriate state tribunal is foreclosed by virtue of language in Kentucky v. Indiana, 281 U.S. 163 at 165, 74 L. Ed. 784, 50 S. Ct. 275 (1930), the issue in that case involved a third

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2. Although recognizing complete immunity from suit in its own courts by virtue of West Virginia Constitution, Article VI, § 35, West Virginia provides a tribunal for determination and payment of claims against the State. This tribunal is the West Virginia Court of Claims. The establishment, jurisdiction, authority and procedure of this tribunal is set forth in West Virginia Code 14-2-1 et seq. The West Virginia Court of Claims is accessible to California in the same manner that it would be to a private institution of higher learning. Long ago this Court recognized that there are circumstances in which a state would take on the character of a private citizen to seek judicial determination of a claim. Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. Ed. 437 (1829). This circumstance, a claim for the payment of money, is appropriate for that determination.

party suit by citizens of Indiana, in the courts of that state, challenging Indiana's authority to enter into the contract with Kentucky. Unlike the question here, which is purely one of monetary compensation, the issue in Kentucky v. Indiana, supra, dealt with a determination of state law and statutory authority. The impropriety of having the validity of a contract subject to conflicting decisions in the courts of two states is readily apparent. But, when the issue is restricted to what, if anything, is the measure of monetary compensation, seeking a determination in a state tribunal is appropriate and not prejudicial to either party.

Additionally, California cites Kentucky v. Indiana, supra, for the proposition that a contractual dispute between states is a proper area for

granting jurisdiction. But this interpretation of the case is incorrect to the extent that it is suggested as authority for granting original jurisdiction in the instant case.

The contract at issue in Kentucky v. Indiana, supra, was of a kind and character so far removed from the one entered into in the instant case that comparison is difficult. Kentucky and Indiana had entered into an interstate compact to build a bridge between cities of the two states. The United States Constitution, Article 1, § 10, cl. 3, in explicit terms, forbids any state of the Union from entering into any agreement or compact with another state without the consent of Congress. But with the consent of Congress, states as sovereigns, may enter into any compact or agreement as they deem necessary. The construction

and maintenance of bridges is among the class of interstate compacts to which Congress has consented. Delaware River Joint Toll Bridge Com. v. Colburn, 310 U.S. 419, 84 L. Ed. 1287, 60 S. Ct. 1039 (1940).

The differences between an interstate compact and the instant case are obvious. A compact presupposes an important interest of the quasi sovereign, but the agreement in the instant case is granted no such presumption. Compacts by definition may be entered into only between states of the Union. Conversely, both West Virginia University and San Jose State University are free to, and do enter into agreements to play football games with privately chartered institutions. Additional distinctions would only belabor the self-evident. The fact that this Court

has granted original jurisdiction for a dispute with respect to an interstate compact is not precedent for extending the same opportunity for the dispute in the instant case.

Perhaps in recognition of this fact, California attempts to elevate the nature of the dispute by characterizing it as a question of whether or not one state may unilaterally rescind or break an agreement with another. Such a characterization is overbroad and contrary to the facts.

California has failed to inform the Court that the original agreement included an escape clause that allowed either party to withdraw from the agreement upon the occurrence of prescribed circumstances. West Virginia chose to invoke the escape clause upon the determination that in the six-year

interval since the agreement was entered into, and while the agreement was still entirely executory, various factors had arisen which made the invocation of the escape clause a justified and proper act.

Rather than a resort by West Virginia to unilateral breach as an instrument of policy for dealing with a sister state, the controversy is a mundane disagreement over the somewhat ambiguous language of perfunctory agreement for a sporting event. Even in the most elaborately drafted contract, disputes as to interpretation can arise and such is the situation presented here. Contrary to the contention of California, this case does not involve a real threat to the area of harmonious relationship between the states.

CONCLUSION

This Court has not previously exercised original jurisdiction for an action of this nature. The plaintiff state has failed to show that this Court must, as a matter of absolute necessity, act to protect its interest, and that the interest sought to be protected is a significant interest of the quasi sovereign. An alternative forum is available in which California may seek redress of its claim.

It is respectfully requested that this Court deny California's motion for leave to file its complaint.

DATED: September 23, 1981

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald L. Darling, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the within Brief in Opposition to Plaintiff's Motion for Leave to File Complaint upon the State of California by depositing a true copy thereof in the United States Mail, first-class postage prepaid this 24th day of September, 1981, addressed to:

Honorable Edmund G. Brown, Jr.
Governor of the State of
California
State Capitol
Sacramento, California 95814

Honorable George Deukmejian
Attorney General of the
State of California
555 Capitol Mall, Suite 350
Sacramento, California 95814

Donald L. Darling

DONALD L. DARLING

SUPREME COURT OF THE UNITED STATES

NO. 91, ORIGINAL

Statement setting forth the details of filing by depositing in the United States mail with first-class postage prepaid, Brief in Opposition To Plaintiff's Motion For Leave to File Complaint.

I, Donald L. Darling, a member of the Bar of the United States Supreme Court, hereby make this statement in accordance with Rule 28.2 of the Rules of the United States Supreme Court.

I do hereby state and certify that the foregoing Brief in Opposition To Plaintiff's Motion For Leave to File Complaint, in Action No. 91, Original, State of California v. State of West Virginia, was filed pursuant to Rule 28 of the Rules of the United States Supreme Court, by depositing sixty (60) copies in the United States Mail, first-class postage prepaid, and addressed to:

Alexander L. Stevas, Clerk
United States Supreme Court
Washington, D. C. 20543

on the 24th day of September, 1981.

Donald L. Darling
DONALD L. DARLING

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Gregg N. Bailey, a Notary Public for the aforesaid State and County, do hereby certify that Donald L. Darling, whose name is signed to the foregoing document, dated the 24 day of September, 1981, has acknowledged the same before me on this 24 day of September, 1981.

My commission expires October 5, 1989.

Gregg N. Bailey
Notary Public